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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD P. KRELL, *et al.*,

*Petitioners,*

-and-

RICHARD JOHNSON,

*Petitioner,*

*vs.*

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*,

*Respondents.*

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ROBERT C. WINTERS AND THE ESTATE OF ROBERT A. BECK

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Should this Court grant certiorari review to consider issues of subject matter jurisdiction, standing, typicality and adequacy of notice in connection with the settlement of a multi-billion dollar class action involving insurance sales practices, where (1) every court that has considered the Settlement, as well as the insurance regulators of every state, have found it to be fair and reasonable; (2) the issues on which petitioners seek review all rest on well documented factual findings of the district court which were affirmed by the Court of Appeals for the Third Circuit; and (3) the rulings of the courts below apply long established legal principles as to which there are no conflicts among the circuits.

## PARTIES TO THE PROCEEDING

The respondent identified in the captions to the petitions is The Prudential Insurance Company of America ("Prudential"). The respondents should also include defendants Robert C. Winters and The Estate of Robert A. Beck, as well as the class representatives: Carol Nicholson, Martin Dorfner, Vincent Kuchas, Elizabeth Kuchas and Norman Gassman.

## STATEMENT PURSUANT TO RULE 29.6

Prudential is a mutual insurance company. To the extent it is required to respond to Supreme Court Rule 29.6, Prudential states that it does not have any parent companies. Prudential has numerous wholly owned subsidiaries. The following are Prudential's nonwholly owned subsidiaries:

745 Property Investments
Prudential Mortgage Asset Corporation II
Prudential of America Life Insurance Company (Canada)
Preferred Coastal Realty, Inc.
Bache & Co. S.A. de C.V. (Mexico)
Lapine Holding Company
Lapine Development Corporation
Lapine Technology Corporation
Prudential Securities (Brazil) LTDA
Prudential-Bache International (Hong Kong) Ltd.
Prudential Bache Futures (Hong Kong) Limited
Prudential Bache Nominees (Hong Kong) Limited
Prudential Bache Securities (Hong Kong) Limited
Prudential Bache Finance (Hong Kong) Limited
PAMA (Indonesia) Limited
P.T. PAMA Ventura Indonesia

## TABLE OF CONTENTS


| | Page |
|---|---|
| Counterstatement of Questions Presented | i |
| Parties to the Proceeding | ii |
| Statement Pursuant to Rule 29.6 | iii |
| Table of Contents | iv |
| Table of Cited Authorities | vi |
| Counterstatement of the Case and Summary of Argument | 1 |
| A. The Class Settlement Presents A Unique And Unparalleled Response To The Sales Practices Claims Of Prudential Policyholders. | 1 |
| B. The Settlement Involved An Extraordinary Effort To Inform Class Members About The Remediation Plan And To Encourage Their Participation. | 5 |
| Reasons for Denying the Petitions | 9 |
| I. Subject Matter Jurisdiction Under 28 U.S.C. § 1367, Was Properly Analyzed And Invoked By The Courts Below. | 9 |
| II. The Third Circuit's Decision Does Not Contravene *Lewis v. Casey*. | 14 |

*Table of Contents*


| | *Page* |
|---|---|
| III. Petitioners' Typicality Argument Is Based On Factual Distortions Unworthy Of This Court's Review. | 17 |
| IV. Petitioner Johnson Fails To Demonstrate Why This Court Should Address The Issue Of Notice In This Case. | 18 |
| Conclusion | 19 |

## TABLE OF CITED AUTHORITIES


*Page*

*Allee v. Medrano*, 416 U.S. 802 (1974) ..... 15

*Amchem Prods., Inc. v. Windsor*, __ U.S. __, 117 S. Ct. 2231 (1997) ..... 1, 5

*City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S. Ct. 523 (1997) ..... 11

*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) .. 18

*In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) ..... 1, 2, 17

*Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994) ..... 11

*Lewis v. Casey*, 518 U.S. 343 (1996) ..... 14, 15, 16, 17

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) ..... 18

*Peacock v. Thomas*, 516 U.S. 349 (1996) ..... 11

*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) ..... 9, 10, 12

**Statute:**

28 U.S.C. § 1367 ..... 9, 11

*Cited Authorities*

*Page*

**Rule:**

Federal Rule of Civil Procedure 23(a) ..... 13

**Other Authority:**

Herbert Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) ..... 15

## COUNTERSTATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

### A. The Class Settlement Presents A Unique And Unparalleled Response To The Sales Practices Claims Of Prudential Policyholders.

Although this case, and the Settlement which resolved it, involve significant dollar amounts, the few legal issues the remaining objectors seek to raise before this Court are not significant at all. They involve application of long standing legal principles to well established facts and present no issues worthy of certiorari review. The class action Settlement is now being contested by just two groups of objectors, both represented by counsel with competing putative class actions against Prudential. The Settlement was approved by the district court and a unanimous panel of the Third Circuit Court of Appeals, the same court that had issued the seminal class action settlement decision affirmed by this Court in *Amchem Prods., Inc. v. Windsor*, __ U.S. __, 117 S. Ct. 2231 (1997).[1] Following its review and consideration of the voluminous record, including a panoply of objections, the district court held — and the Third Circuit, applying this Court's decision in *Amchem*, affirmed — that the Settlement was fair, reasonable and adequate "beyond a doubt" (App. 178; 962 F. Supp. at 468) and indeed, "exceptional" (App. 81; 148 F.3d at 317), and that the Settlement class was properly certified.[2] (App. 79; 148 F.3d at

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1. The Third Circuit's opinion and order in this case is attached as volume 1 of the Appendix to the petitions, and is reported at 148 F.3d 283 (3d Cir. 1998). The district court's opinion and order in this case is attached as volume 2 of the Appendix to the petitions, and is reported at 962 F. Supp. 450 (D.N.J. 1997). The applicable appendix citations ("App. __") and Federal Reporter and Federal Supplement citations are provided herein.

2. Following the procedure set forth in the Third Circuit's decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab.* (Cont'd)

316.) The Settlement has also received unprecedented regulatory support. Insurance regulators from all 50 states and the District of Columbia — the experts charged with administering and enforcing the insurance laws of this country — have given the Settlement their "seal of approval," accepting the plan as fair and adequate to Prudential's policyholders. (App. 112-113; 148 F.3d at 329.)

Petitioners here have largely abandoned the objections they submitted below. Their remaining challenges to the district court's subject matter jurisdiction and the named plaintiffs' standing, while cloaked in language suggesting that the courts below misapplied Constitutional standards, are in reality nothing more than disputes over the factual findings of those courts as to the typicality of the named plaintiffs' claims and their ability adequately to represent the entire class. While petitioners may be dissatisfied with those factual findings, the decisions below simply applied principles of federal law, well established by this Court, to the allegations and claims at issue in this class action. In short, the petitions provide no compelling reasons to grant certiorari review and should be denied.

It is little wonder that the Settlement received the unconditional approval of the courts below. Unlike other class action cases that have come before this Court, involving limited fund settlements or the problem of future claimants, this Settlement represents an unprecedented effort to reach out to past and present Prudential policyholders and to fully remediate their claims concerning improper sales practices, without any cap on Prudential's exposure. The Settlement establishes a cost-

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(Cont'd)

*Litig.*, 55 F.3d 768, 778 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995), Prudential stipulated to class certification for settlement purposes only, while preserving all of its legal rights, remedies and defenses. (*See* App. 92; 148 F.3d at 321.)

free alternative dispute resolution process (the "ADR" program), with multiple levels of review and specific claims scoring criteria, to remediate the claims of policyholders who believe they were misled in the purchase of their life insurance.[3] (App. 20-23; 148 F.3d at 295-96.) The ADR program provides *complete compensation* to any Class Member for whom it can be shown — either through evidence from his or her own or the Company's files, or through presumptions provided in the agreement concerning the agent's past conduct — that their purchase resulted from improper sales practices. (App. 6, 26 n.23, 96; 148 F.3d at 289, 297 n.23, 322-23.)

Prudential has committed to certain specific financial guarantees — creating a recovery "floor," not a "cap" as is common in other settlements. Prudential has agreed to expend at least $260 million for each 110,000 claims remedied (up to a total of 330,000). (App. 27; 148 F.3d at 297.) It has guaranteed a minimum cost of $410 million in remedies, no matter what the number of claimants, and has agreed to provide additional millions in further compensation beyond actual losses suffered by Class Members. (App. 27-28; 148 F.3d at 297.) Defendants have also agreed to a blanket waiver of statute of limitations and other defenses — defenses which the district court previously held constituted significant legal bars to recovery by many, perhaps most, Class Members. (*See* App. 369-70; 962 F. Supp. at 539.) Finally, Prudential will assume all of the substantial administrative expenses for the remediation plan, thus, as the Third Circuit noted, "ensur[ing] that the

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3. In addition, the Settlement includes what is termed Basic Claim Relief ("BCR") for policyholders who do not believe they were misled by Prudential or who otherwise choose not to make an ADR claim. BCR includes certain financial assistance and policy enhancements, without diverting a single dollar from the ADR claimants' possible recovery. (App. 241-42, 252; 962 F. Supp. at 490-91, 495; *see also* App. 24; 148 F.3d at 296.)

administrative and legal costs of the settlement will not diminish the class recovery." (App. 113; 148 F.3d at 329.)

Petitioner Krell questions the inclusion of an "other sales practices claims" category in the scope of possible recipients of relief under the Settlement; however, as the courts below found, these claims were properly included within the Settlement and, in fact, are integral to the goal of full remediation for injured policyholders, many of whom raise claims involving a wide range of different, but related, sales practices issues. (App. 54, 16 n.10; 148 F.3d at 307, 293 n.10; App. 314-15; 962 F. Supp. at 518-19.) There are thus no "class conflicts," for all who are injured may claim and receive, as appropriate, full, and individually tailored, compensatory relief. (App. 68-72; 148 F.3d at 312-13; App. 321-24; 962 F. Supp. at 521-22.) As the Third Circuit concluded, this Settlement is "impress[ive]" in the "nature and extent" of relief provided to Class Members because it "responds to the individual claims of the class and provides compensation based on the harm they have suffered." (App. 112; 148 F.3d at 328; *see* App. 178, 360; 962 F. Supp. at 468, 535.)

As both courts below stressed, the fairness of this Settlement and its enormous value to Class Members is the product of hard-fought litigation and arduous negotiations. (App. 12-19, 70; 148 F.3d at 292-94, 313; App. 367-68; 962 F. Supp. at 538.) The parties reached agreement only after engaging in extensive motion practice, exchanging over a million pages of documents and a vast array of other materials and conducting numerous depositions and interviews of senior Prudential personnel and experts. (App. 367 n.63; 962 F. Supp. at 538 n.63.) The compromise was reached with the benefit of legal rulings by the district court on hotly contested substantive motions which clarified for the parties the legal framework within which the case would be litigated and, for each party,

highlighted the risks of going forward with litigation. (App. 367 n.62; 962 F. Supp. at 538 n.62.) The procedural posture of this matter thus stands in sharp contrast to those cases — including *Amchem Prods. Inc. v. Windsor*, __ U.S. __, 117 S. Ct. 2231 (1997) — where the litigation was commenced solely to obtain approval for an already agreed upon resolution.

It is thus hardly surprising that only a minuscule portion of the Class, which consists of the owners of 10.7 million policies, chose to opt out of the Settlement (.22%, or about one-quarter of one percent of the Class). (App. 84-85; 148 F.3d at 318.) An even tinier number of policyholders (about 300) raised objections in the district court (*id.*), and only three small groups of Class Members pursued appeals, two of which have now petitioned this Court for a writ of certiorari. By contrast, and as a credit to Prudential's remarkable commitment to reach out to its policyholders to remedy any injury, a significant number of policyholders have chosen to participate in the Settlement. (App. 540.)

**B. The Settlement Involved An Extraordinary Effort To Inform Class Members About The Remediation Plan And To Encourage Their Participation.**

Petitioner Johnson's attack on the adequacy of Notice is yet again nothing more than a challenge to the consistent factual findings of the district court which were affirmed by the Third Circuit. As the district court concluded, and the Court of Appeals agreed, the overwhelmingly positive response of Class Members results in large part from the "unparalleled outreach program" established by the Settlement to "ensure that class members [were] adequately informed." (App. 28; 148 F.3d at 297.) Pursuant to the district court's October 28, 1996 Order, "[w]here possible, each individual class member received individual notice" by first class mail. (App. 339; 962 F. Supp.

at 527-28.) Prudential mailed individual Class Notices to over 8 million current and former policyholders (the "November Class Notice"). (App. 107-08; 148 F.3d at 327.) In addition, a Court-approved Summary Notice was published in the largest circulating newspaper in each of the 50 states and the District of Columbia, including *The New York Times*, *The Wall Street Journal*, *USA Today*, and *The Star Ledger*, the principal newspaper in Newark, New Jersey, where Prudential is headquartered. (App. 108; 148 F.3d at 327.) As the district court found, "[d]issemination of the Class Notice in this case [was] extraordinary. . . . Indeed, the dissemination of the Class Notice was ideal." (App. 339; 962 F. Supp. at 527.) The Third Circuit concluded that "the combination of individual and publication notice, combined with the unsolicited news coverage the settlement received, greatly increased the possibility that Prudential will ultimately compensate a greater number of injured policyholders than would otherwise have been possible." (App. 109; 148 F.3d at 327.)

The Court of Appeals and the district court agreed that the Class Notice materials provided "all of the required information concerning the class members' right [*sic*] and obligations under the settlement." (App. 110; 148 F.3d at 328.) As the Court of Appeals explained, the Class Notice:

> detailed the procedures for opting out, entering an appearance, and filing objections, and notified the policyholders that if they did not opt out of the class they would be bound by the settlement if approved. It explained the ADR process and Basic Claim Relief available to the class, provided the text of the release, and provided notification that all related documents were available for public inspection. Finally, it explained the nature of the claims covered under the settlement, and provided an 800 number

> through which class members could obtain information and make further inquiries. The fact that approximately 1.8 million inquiries have already been processed through the 800 number supports the conclusion that the class Notice was effective.

(*Id.*)

Both before and after the district court's approval of the Settlement, additional Notices were sent, further describing the relief available and reminding policyholders that they would have to elect ADR or Basic Claim Relief by the set deadline in order to participate. (App. 109-110 n.92; 148 F.3d at 327 n.92.) Following the district court's approval of the Settlement, a court-ordered Notice was sent to policyholders who had previously excluded themselves from the Class to provide them the opportunity to withdraw that exclusion and participate in the Settlement in light of certain enhancements to the Settlement. (App. 440; 962 F. Supp. at 565.)

Finally, the parties conducted two more massive media outreach campaigns after district court approval. During April, 1997, Class Counsel and Prudential prepared and published Notices concerning the district court's approval of the Settlement and the remediation plan's election deadline in the largest newspapers in all 50 states and the District of Columbia; in national magazines, including *Parade*, *People*, *TV Guide* and *USA Today*; as well as the largest national papers in the Chinese, Korean and Russian languages. (*See* App. 109-10 n.92; 148 F.3d at 327 n.92; App. 440; 962 F. Supp. at 565.) The parties also ran advertisements on all three major television networks and on network radio. A second round of similarly broad advertising followed in May, 1997. (*Id.*) In short, Class Members were repeatedly and fervently urged to participate in the Settlement. (*Id.*; App. 107-08; 148 F.3d at 327.)

These Notice materials included specific references to the "other claims" category about which Petitioner Krell complains. The Court of Appeals concluded, regarding the category of "other claims," that "the class notice makes clear that additional claims which do not fit neatly into one of the other three categories may nonetheless be remedied through the ADR process." (App. 110; 148 F.3d at 328.) In fact, the Court of Appeals stressed that,

> [c]ompared to the first three categories, which require some understanding of insurance policies, the catch-all category of 'other improper sales practices' is arguably easier for the uninformed layman to comprehend, and may in fact encourage class members to respond to the Class Notice.

(App. 111; 148 F.3d at 328.)

These "other claims" had always been part of the case and controversy. Thus, the Court of Appeals also rejected Petitioner Krell's contention that the Class was expanded at the last minute to include "unidentifiable" "other claims." (App. 104-105; 148 F.3d at 325-26.) The First Consolidated Complaint included a class definition of all purchasers of Prudential whole life policies since 1980 (App. 13; 148 F.3d at 292); the Second Consolidated Complaint narrowed the Class by limiting the Class Period but still included *all* purchasers. (App. 180-81; 962 F. Supp. at 468-69.) *Both* broadly covered all claims relating to the sale, servicing and operation of those policies. (*See* App. 16 n.10; 148 F.3d at 293 n.10.) Noting that the "other claims" were "part and parcel" of the plaintiffs' case and specifically identified and covered in the ADR Guidelines, the Court of Appeals concluded that "the [other] claims of the absentee[ ] [Class Members] here are adequately incorporated in the terms of the settlement." (App. 105-06; 148 F.3d at 326.)

## REASONS FOR DENYING THE PETITIONS

### I.

### SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1367, WAS PROPERLY ANALYZED AND INVOKED BY THE COURTS BELOW.

No one disputes that the district court had jurisdiction over class representative Dorfner's federal securities laws claim, and the federal securities claims of other similarly situated plaintiffs. With this jurisdictional foundation, § 1367 grants supplemental jurisdiction over "all other claims that are so related . . . that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). Under this Court's holding in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), a claim is part of the same case or controversy if it "derive[s] from a common nucleus of operative fact" and "would ordinarily be expected to be tried in one judicial proceeding." *Id.* at 725.[4] Both the district court and Court of Appeals, applying the *Gibbs* standard, found that the state law claims of the Class Members here — essentially claims for fraud and negligent misrepresentation — easily met this factual test. (*See* App. 42-43; 148 F.3d at 303; App. 268-70; 962 F. Supp. at 501.)

The district court found that the state law claims share "significant factual elements" and are "so clearly related" to the federal claims that they form a part of the same case or controversy. (App. 269-70; 962 F. Supp. at 501.)

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4. Such claims need not meet the amount in controversy requirement of diversity jurisdiction. 148 F.3d at 305 (holding that because the district court's supplemental jurisdiction was premised on its original federal question jurisdiction and not on diversity grounds, the sufficiency of the amount in controversy was irrelevant.)

As the district court stated:

> Dorfner and others allege that Prudential sold its VAL policies in violation of federal laws through the financing mechanisms and other deceptive sales practices that comprise plaintiffs' state law claims. All the claims are premised upon a common course of conduct by Prudential; all relate to the same alleged company-wide development and implementation of the patently fraudulent sales techniques.

(App. 270; 962 F. Supp. at 501.) The Court of Appeals agreed:

> The Second Amended Consolidated Complaint clearly alleges that Prudential engaged in a common scheme to defraud. Each category of claims raised in the Complaint relied on the implementation of that scheme, the training of Prudential's agents in conformity with it, and the use of pre-approved materials to support it. While only one category of claims alleged in the Complaint involved violations of the federal securities laws, all of the claims derive from the same common scheme, and thus from the same "nucleus of operative fact."

(App. 42; 145 F.3d at 303.) Both courts below concluded under *Gibbs* that plaintiffs' federal and state law claims are "inextricably factually intertwined" and therefore derive from a common nucleus of operative fact. (App. 42; 148 F.3d at 302-03; App. 269-70; 962 F. Supp. at 501.)[5]

5. Both lower courts also concluded that the second prong of the *Gibbs* test, that the claims would ordinarily be expected to be tried in one judicial proceeding, had been satisfied. (*See* App. 39-42; 148 F.3d at 302-03.)

Faced with these clear and powerful findings of the courts below, Krell argues that those courts should have applied a different standard based on this Court's decision in *Kokkonen v. Guardian Life Ins. Co.* 511 U.S. 375 (1994). Krell asserts that *Kokkonen* provides the appropriate standard for determining supplemental jurisdiction under 28 U.S.C. § 1367, that it constitutes a legal standard different from the one in *Gibbs*, and that the *Kokkonen* standard has not been met here. He is wrong on all three points.

*Kokkonen* and *Peacock v. Thomas*, 516 U.S. 349 (1996) (also cited by Krell) do not even deal with supplemental jurisdiction under § 1367. Rather, both address whether there is ancillary federal jurisdiction to hear state law claims that purportedly relate to federal claims adjudicated in a *prior lawsuit*.[6] It thus should come as little surprise that cases decided by this Court after *Kokkonen* continue to apply the well-established *Gibbs* test to determine whether there is supplemental jurisdiction under 28 U.S.C. § 1367(a). *See, e.g.*, *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S. Ct. 523, 529-530 (1997).

Moreover, *Kokkonen* and *Peacock* do not announce a new legal standard, but stand only for the unremarkable proposition that a federal claim will not support ancillary federal jurisdiction over a state claim if the facts underlying the two have "nothing to do with each other," (511 U.S. at 380) or if the two types of claims have "little or no factual or logical interdependence" (516 U.S. at 356). This so-called "factual interdependence"

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6. In *Kokkonen*, the subsequent breach of contract lawsuit was brought to enforce the agreement underlying the settlement of a prior diversity action. *See* 511 U.S. at 377. In *Peacock*, the state law claim was to "pierce the corporate veil" after the judgment petitioner had received in a prior ERISA action became uncollectible. *See* 516 U.S. at 352.

requirement is fully consistent with the "common nucleus of operative fact" standard of *Gibbs*.

Indeed, the courts below made just such an analysis of the factual interdependence of the federal and state claims in this case. The district court found that they were "inextricably factually intertwined." (App. 269-70; 962 F. Supp. at 501.) The Third Circuit stated:

> Of course, § 1367 does not permit courts to take jurisdiction over tangentially related claims. . . . Here the facts underlying the investment deception are so intertwined with the other misrepresentations and frauds that, given the allegations of the overall scheme, they have the same factual predicate, making extension of federal jurisdiction appropriate.

(App. 43; 148 F.3d at 303.)

Krell attempts to convince this Court to reexamine these factual conclusions. He relies on Judge Roth's concurrence, in which she states that while Dorfner's federal claims clearly provide supplemental jurisdiction over Dorfner's state law claims and the 30% of Class Members who, like Dorfner, purchased VAL policies which raise both federal and state claims, they may not provide supplemental jurisdiction for the remaining Class Members whose claims arise only under state law.[7] (Krell at 2, 15; App. 158-59; 148 F.3d at 346 (Roth, J., concurring).)

There is, however, no legal basis for a jurisdictional analysis based on the percentage of federal claims in the Class.

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7. Krell's petition is cited to herein as "Krell at __." Johnson's petition is cited to herein as "Johnson at __."

For purposes of supplemental jurisdiction, a court must examine whether the types of state and federal claims asserted would, as a factual matter, arise out of a common nucleus of operative fact regardless of what percentage are federal claims and what percentage are state law claims. In this case, they were found to be "inextricably factually intertwined," an issue Krell did not even dispute before the district court. (App. 270, n.32; 962 F. Supp. at 501, n.32.)[8]

Judge Roth's percentage approach appears to be more of a Rule 23 typicality or adequacy of representation analysis, where the lower court must examine whether the named plaintiffs' claims, both federal *and* state, are representative of the class as a whole. In any event, here again, the lower courts found that these Rule 23(a) requirements clearly had been met. (App. 60-72; 148 F.3d at 309-13; App. 292-324; 962 F. Supp. at 510-22.)

In short, the federal and state claims here are sufficiently interrelated to meet any conceivable standard for supplemental jurisdiction. The undisputed finding of two courts that the federal and state claims in this case arise out of a "common nucleus of operative fact" is dispositive of the subject matter jurisdiction issue here. There is no reason for this Court to review that finding on certiorari.

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8. Krell's contention that the "other claims" are "unknown" and therefore not subject to appropriate analysis for purposes of subject matter jurisdiction is unfounded. As discussed above, the "other sales practices claims" are not only "known," but the category itself exists because these claims are integrally tied to the "financed insurance," "APP" and "life insurance sold as an investment" categories.

## II.

## THE THIRD CIRCUIT'S DECISION DOES NOT CONTRAVENE *LEWIS v. CASEY.*

Petitioner Krell's attack on the standing of the class representatives is based on the premise that the class representatives "could not assert most of the claims of the Settlement Class." (Krell at 1.) This premise is false and clearly refuted by the opinions below, which hold that the claims of the class representatives were typical of all claims arising out of Prudential's alleged fraudulent sales practices, including claims for "other improper sales practices." As the district court stated:

> [C]lass members injured by "other fraudulent sales practices" have suffered the same injury — they are victims of Prudential's deception — and have suffered the same generic type of harm — they have economic damages — as the named plaintiffs.

(App. 315; 962 F. Supp. at 519.) The Court of Appeals concluded that "the district court's typicality analysis is correct." (App. 66; 148 F.3d at 311.)

Krell seeks to make much of selective quotations from *Lewis v. Casey*, 518 U.S. 343 (1996), a case which arose in an entirely different factual and procedural context. At its core, however, his argument does not rest on *Lewis v. Casey* at all, but on his disagreement with the courts below that "other claims" arising out of fraudulent sales practices are sufficiently factually similar to the claims asserted by the class representatives to confer standing with respect to such "other claims."

*Lewis v. Casey* was a class action by inmates in various Arizona prisons, who alleged that inadequate legal research facilities in the prisons had deprived them of their right of access to the courts. 518 U.S. at 346. After a trial, only one of 22 named plaintiffs was found to have suffered actual injury, and he was injured by virtue of his illiteracy. *Id.* at 358. Justice Scalia, writing for this Court, held therefore that additional services ordered by the district court for prisoners who had suffered other types of injuries "were not the proper object of this District Court's remediation." *Id.*

Accordingly, *Lewis* stands for the unsurprising proposition that a named plaintiff in a class action, like plaintiffs in individual actions, must demonstrate standing through injury, and cannot rely on the possibility that some other and unidentified member of the class might have suffered injury sufficient to support Article III standing. *Id.*[9] It also holds that the remedies ordered after trial must be related to the injuries actually proven at trial. *Id.* In this case, of course, settlement occurred prior to trial. Injury as a result of defendants' alleged improper sales practices was clearly alleged on behalf of each class representative, however, and the Settlement provides ADR relief for all the claims alleged. Nothing in *Lewis v. Casey*

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9. *Lewis* leaves untouched the well-established principle that where a named plaintiff otherwise has standing and is properly before the Court — as here — the issue of whether that plaintiff may assert the rights of absent class members "is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 2.07 at 2-41 (3d ed. 1992); *cf. Lewis v. Casey*, 518 U.S. at 358, n.6 (distinguishing standing from certification). *See, e.g. Allee v. Medrano*, 416 U.S. 802, 816, n.10 (1974) (holding that where class treatment is proper, named plaintiffs may represent interests of all other class members).

indicates that named plaintiffs lack standing to seek such relief in such circumstances.[10]

Krell seeks to rely primarily on some comments in footnote 6 of the Court's opinion in *Lewis v. Casey* in which Justice Scalia contends that the named plaintiff's standing to complain of the prison's failure to provide access to the courts for illiterate prisoners like himself had not "automatically conferred the right to complain of *all* administrative deficiencies." 518 U.S. at 358 n.6 (emphasis added). Krell tries to assert by analogy that the named plaintiffs' right to assert claims in this case for churning, APP and investment plan claims does not automatically confer a right to complain of other improper sales practices. (Krell at 15.)

This is a specious analogy. Injury as an illiterate did not confer standing to raise claims of non-English speaking prisoners, or prisoners in lockdown, because there was no evidence in *Lewis v. Casey* that such prisoners suffered factually similar types of harm. Here, by contrast, there have been clear and unanimous findings by both courts below that claims

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10. Quite the contrary, *Lewis v. Casey* indicates that, at the pleading stage, even "general allegations" may suffice to provide "standing to demand remediation with respect to various alleged inadequacies in the prison system." 518 U.S. at 357. If so, then the very specific and detailed allegations made on behalf of the class representatives in this case surely conferred standing to settle for relief which remedied such claims. Moreover, as *Lewis v. Casey*, makes clear,

> the inappropriateness of systemwide relief for illiterate inmates *does not rest upon the application of standing rules*, but rather, . . . , upon "the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system."

518 U.S. at 360 n.7 (emphasis added).

relating to other improper sales practices are sufficiently factually similar to the claims made by the named plaintiffs — and indeed, as to many Class Members, integral to their financing, APP, and investment claims — to permit their assertion in the class action. Footnote 6 of *Lewis v. Casey*, which calls for precisely such individualized determination of the factual relatedness of different types of injuries, is not to the contrary.

## III.

## PETITIONERS' TYPICALITY ARGUMENT IS BASED ON FACTUAL DISTORTIONS UNWORTHY OF THIS COURT'S REVIEW.

Petitioners' entire typicality argument is based on their theory that the inclusion of "other claims" destroys the Settlement. As shown above, petitioners' "other claims" arguments are factually wrong. The Third Circuit's holding that "other claims" are properly included in the Settlement Class raises no substantial legal issues, and petitioners do not contend that there is any conflict among the courts. This Court need not grant the writ requested to review the lower courts' factual determinations.[11]

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11. As indicated above in note 2, pursuant to the procedures set forth in *GM Trucks*, Prudential did not submit papers in support of class certification in the district court, but stipulated to certification, for settlement purposes only, while reserving all rights.

## IV.

## PETITIONER JOHNSON FAILS TO DEMONSTRATE WHY THIS COURT SHOULD ADDRESS THE ISSUE OF NOTICE IN THIS CASE.

The district court found that the individual and publication Notice in this case was exceptional (App. 339; 962 F. Supp. at 527-28), and the Third Circuit affirmed this holding. (App. 107-09; 148 F.3d at 327.) Petitioner Johnson's complaints before this Court regarding the content of the Class Notice are nothing more than a rehash of arguments heard and rejected by the lower courts. Petitioner Johnson avers that review of Notice by this Court is necessary in this case in order for the Court to opine on "[w]hat constitutes adequate content of notice of a settlement class action." (Johnson at 8.) There is no conflict among the circuits on this issue, and the Constitutional requirements for adequate class notice are amply spelled out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and their progeny.

Johnson really seeks nothing more than a review of the lower courts' factual findings regarding Notice in this case. Johnson complains that Notice in this case was

> too long, . . . too detailed, . . . vague regarding the plaintiff's [*sic*] complaints, . . . confusing, and . . . [failed to allow] a reasonable absent member of the settlement class . . . [to] divine his or her rights or make an informed decision regarding remaining in, opting out, or choosing relief.

(Johnson at 5.) The district court examined these issues. It held that the Notice program was easy enough to be understood by the average class member, was both appropriately

comprehensive and brief, and allowed policyholders to make informed decisions as to their Class membership and course of relief. (App. 254-55, 341-42, 353-54; 962 F. Supp. at 495, 526-29, 533-34.) Furthermore, while not necessary to the district court's holdings, the fact that any policyholder with questions could have received individualized help from a neutral third party by simply dialing an "800 number" set forth in numerous places throughout the Notice materials, fully discredits the idea that policyholders could not, and did not, make informed decisions. (*See* App. 110; 148 F.3d at 328.) The Third Circuit reviewed the district court's findings and unequivocally affirmed the adequacy of the Notice program in this case. (App. 110-111; 148 F.3d at 328.) There is simply nothing for this Court to review here.

## CONCLUSION

For the foregoing reasons, defendants-respondents The Prudential Insurance Company of America, Robert C. Winters and The Estate of Robert A. Beck respectfully request that the petitions for writ of certiorari be denied.

Respectfully submitted,

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